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CEMPAKA MEWAH SDN BHD v. PENGARAH UKUR DAN PEMETAAN NEGERI SEMBILAN DARUL KHUSUS

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
AZIMAH OMAR JCA
B WONG KIAN KHEONG JCA
[CIVIL APPEAL NO: N-01(NCVC)(A)-460-06-2022]
18 MARCH 2024

C **Abstract** – *(i) When interpreting s. 69(2) of the Courts of Judicature Act 1964 ('CJA') and r. 7(2) and (3A) of the Rules of the Court of Appeal 1994 ('RCA'), the court should depart from a strict and literal interpretation and instead adopt a purposive approach to avoid an impractical, undesirable, and absurd consequence that would negate the true spirit and purpose of the RCA and the appellate role of the Court* D *of Appeal, as entrenched by s. 17A of the Interpretation Acts 1948 and 1967; (ii) A purposive interpretation of the relevant provisions means that the special conditions of Ladd v. Marshall, as codified under r. 7(3A) of the RCA, must be cumulatively and conjunctively applied against all applications to admit further evidence on appeal, regardless* E *of the type or class of new evidence. The applicant must therefore satisfy the court that the evidence: (a) could not have been obtained with reasonable diligence for use at the trial; (b) would likely influence the decision of the court; and (c) must be presumably credible.*

F ***STATUTORY INTERPRETATION:*** *Construction of statutes – Leave of court to adduce new evidence at appellate stage – Purposive approach and literal interpretation – Whether court ought to depart from strict and literal interpretation of s. 69(2) of Courts of Judicature Act 1964 and r. 7(2) and (3A) of Rules of the Court of Appeal 1994 – Whether purposive approach ought to be adopted to avoid* G *impractical, undesirable and absurd consequence – Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah & Ors And Other Appeals – Interpretation Acts 1948 and 1967, s. 17A*

EVIDENCE: *Fresh or further evidence – New evidence – Leave of court to adduce* H *new evidence at appellate stage – Whether court should follow strict and literal interpretation of s. 69(2) of Courts of Judicature Act 1964 and r. 7(2) and (3A) of the Rules of the Court of Appeal 1994 – Whether ought to adopt purposive approach of interpretation to ascertain mischief the provisions practically seek to remedy – Whether requisites or threshold of admitting further evidence at appeal satisfied –* I *Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah & Ors And Other Appeals*

The appellant was the developer of Cape Nautica Villas ('CNV project') and PD Marina International Resort Phase 2 (Strait View Villas) ('SVV project'). The appellant's surveyor had submitted an application for the certificate of a proposed strata plan ('CPSP') to the Director of Surveying and Mapping Negeri Sembilan Darul Khusus ('respondent'). The respondent dismissed the application on the grounds that: (i) the car parks were not shown as an accessory parcel in the proposed strata plan although it was contained in section 6 of the fifth schedule of the sale and purchase agreement ('SPA') for the CNV project between the appellant and the purchaser; and (ii) the appellant merely submitted the certified true copy of the plan and not the original one approved or certified by the local planning authority. The appellant filed an originating summons ('OS') at the High Court against, *inter alia*, the respondent. The High Court dismissed the appellant's OS and held that the application for the issuance of the individual strata title was improper and that the respondent had rightly denied the application for the CPSP. Hence, the present appeal. *Via* encl. 24, the appellant sought leave of the court to adduce new evidence, namely: (i) SPA dated 18 August 1994 between the appellant and a purchaser of a parcel in the SVV project ('CM-3'); and (ii) a strata title No. PN 11590, No. Building M3, No. Level 7, No. Plot 317, District Port Dickson, Negeri Sembilan, which was issued for the parcel purchased under the CM-3 ('CM-4'). The issues that arose were: (i) whether the court should follow the strict and literal interpretation of s. 69(2) of the Courts of Judicature Act 1964 ('CJA') and r. 7(2) and (3A) of the Rules of the Court of Appeal 1994 ('RCA'), as applied in the case of *Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah & Ors And Other Appeals* ('*Krishnasamy*') or prefer a purposive approach of interpretation so as to ascertain the mischief the provisions practically seek to remedy ('first issue'). The appellant contended that the additional criteria (special grounds) in *Ladd v Marshall*, as codified in r. 7(3A) of the RCA were no longer applicable on the supposition that it was *ultra vires* against the parent provision of s. 69(2) of the CJA. The appellant insisted that the provision was denounced to be invalid for being *ultra vires*, by the Court of Appeal ('COA') in *Krishnasamy*; and (ii) whether the appellant's encl. 24 satisfied the requisites or threshold of admitting further evidence at appeal ('second issue').

Held (dismissing encl. 24)

Per Azimah Omar JCA delivering the judgment of the court (for the majority):

(1a) The appellant's reading and comprehension of the true context of the decision in *Krishnasamy* was erroneous and misconceived. Instead, the true context and essence of the decision in *Krishnasamy* was the strict and literal interpretation of the prevailing provisions and the literal identification of the different 'classes' of 'new evidence'

(and identifying the corresponding appropriate treatment according to the different classifications of 'new evidence'). The COA in *Krishnasamy* found that the requirement of leave and the special conditions in r. 7(3A) of the RCA was *ultra vires* only if it was broadly applied against subsequent evidence, in which the admittance of subsequent evidence at appeal was specifically governed under s. 69(2) of the CJA and r. 7(2) of the RCA. The COA in *Krishnasamy* did not declare r. 7(3A) of the RCA to be invalid as against s. 69(2) of the CJA. (paras 31-33)

(1b) The decision in *Krishnasamy* was primarily grounded on the COA's adoption of the literal interpretation of the prevailing provisions in the minority dissenting judgment in *Sin Heap Lee-Marubeni Sdn Bhd v. Yip Shou Shan* ('*Marubeni*'). *Albeit* that the strict and literal approach in interpreting the cumulative provisions applied in *Krishnasamy* and *Marubeni* might be sound, in the literal sense, the same literal approach to statutory interpretation led to an impractical, undesirable and absurd consequence that would effectively negate (i) the true spirit of the RCA and the true purpose of the provisions; and (ii) the very purpose of the COA as the vestige for swift, diligent, effective, efficient and just appellate arbiter within a reasonable perimeter of the principle of non-intervention. In such a circumstance, the Federal Court and the statutory law had prescribed an avenue for the courts to depart from a strict and literal approach to statutory interpretation. This had been entrenched in s. 17A of the Interpretation Acts 1948 and 1967. (paras 35-40)

(1c) Despite the fact that s. 69(2) of the CJA and r. 7(2) of the RCA expressly provide that subsequent evidence may be admitted at appeal without leave of the COA, a purposive interpretation of all the relevant provisions would entail that allowing such free rein to admit new evidence, of any classification, without leave would run contrary to the legislative intent of the true purpose and design of the COA's appellate role and jurisdiction. The first issue was answered in the negative. The court departed from the strict and literal interpretation of s. 69(2) of the CJA and r. 7(2) and (3A) of the RCA, as applied in *Krishnasamy*, and instead preferred a purposive approach of statutory interpretation so as to ascertain the legislative intent and mischief the provisions practically seek to remedy. (paras 45 & 46)

(2a) In view of the court's answer in the first issue, the special conditions of *Ladd v. Marshall*, as codified under r. 7(3A) of the RCA, shall be cumulatively and conjunctively applied as against all applications to admit further evidence, notwithstanding any type or class of new evidence. Therefore, it remained incumbent against the appellant to

prove that CM3 and CM4 were either not available or were unattainable even with reasonable diligence at the time of the hearing at the High Court. The appellant must also prove that these two pieces of documents from the prior SVV project would have likely influenced the decision of the High Court. (para 47)

(2b) It remained irrefutable that both CM-3 and CM-4 would not have any relevance or influence on the decision of the High Court had it been tendered into court at the time the appellant's OS was heard. Therefore, the appellant failed to satisfy all statutory requirements to justify the admittance of CM-3 and CM-4 as new evidence. The second issue was answered in the negative. (paras 53 & 54)

Per Wong Kian Kheong JCA (supporting dismissal of encl. 24 but disagreeing with grounds in main judgment regarding admission of further evidence on appeal):

(1) The COA in *Krishnasamy* had not erred in deciding in the manner that it did. *Krishnasamy* could be further supported by the following reasons: (i) the wording in s. 69(3) of the CJA, *ie,* 'save as to matters subsequent as aforesaid' had clearly shown Parliament's intention for a party to an appeal to use subsequent evidence in an appeal in the COA without obtaining prior leave of the COA; (ii) the words 'save as to matters subsequent as aforesaid' in r. 7(3) of the RCA evinced the intention of the Rules Committee to allow a party to an appeal to rely on subsequent evidence in an appeal in the COA without first obtaining leave from the COA; (iii) r. 7(3A) of the RCA can only apply to existent evidence and not to subsequent evidence. The subsequent evidence can only come into being after the decision of the High Court; and (iv) if the COA decides that prior leave of the COA was required for the use of subsequent evidence in an appeal, this would render nugatory four express provisions of written law, namely: (a) the second limb of s. 69(2) of the CJA; (ii) the words 'save as to matter subsequent as aforesaid' in s. 69(3) of the CJA; (iii) the second limb of r. 7(2) of the RCA; and (iv) the words 'save as to matters subsequent as aforesaid' in r. 7(3) of the RCA ('four express provisions'). (para 23)

(2) It could not be seen how a purposive interpretation of the four express provisions could mandatorily require an application for leave of the COA to admit subsequent evidence for the hearing of an appeal. (para 24)

(3) An application of *Krishnasamy* with regard to subsequent evidence had the following benefit: (i) the COA would not be unduly burdened with applications for leave to adduce subsequent evidence for the purpose of the appeals (leave applications). In this sense, there is a saving of

precious judicial time and resources; (ii) hearings of appeals would not be unnecessarily delayed by the filing and disposal of leave applications; and (iii) parties need not waste time, effort and costs with regard to the filing of leave applications, exchange of affidavits, preparation of written submissions and oral hearings of leave applications. (para 26)

(4) The appellant's reliance on *Krishnasamy* to support encl. 24 was misplaced as encl. 24 concerned existent evidence (the two documents were available before the High Court's decision) and not subsequent evidence. It was clear that *Krishnasamy* could not apply to encl. 24 and this court could not therefore overrule *Krishnasamy* in any event. (para 27)

(5) Enclosure 24 was dismissed with costs for the following reasons: (i) the appellant had possession of the two documents before the High Court's decision and could have adduced them with reasonable diligence for the appellant's use in the OS before the High Court. In other words, the first condition in *Ladd v. Marshall* had not been fulfilled in encl. 24; and/or (ii) the two documents could not have any influence on the High Court's decision because: (a) s. 8A of the Strata Titles Act 1985 had been introduced by the Strata Titles (Amendment) Act 2013 which came into effect in Negeri Sembilan on 1 June 2015. The SVV project was registered on 29 June 2007, before the enforcement of s. 8A of the STA on 1 June 2015. Hence, the documents were not relevant to this appeal; and (b) the two documents, regarding SVV project, which was different from the CNV project, were not the documents required by s. 8A(1)(a) to (i) of the STA to be submitted by the appellant, in respect of the CNV project, to the respondent. In other words, the respondent was not under a statutory duty to consider the two documents. The second condition in *Ladd v. Marshall* had also not been satisfied by the appellant in encl. 24. (para 38)

Case(s) referred to:

Boulevard Plaza Sdn Bhd v. Gas District Cooling (Putrajaya) Sdn Bhd & Another Appeal [2020] 7 CLJ 1 CA ***(refd)***

Chai Yen v. Bank Of America National Trust & Savings Association [1980] CLJU 6; [1980] 1 LNS 6 FC ***(refd)***

Citibank Bhd v. Mohamad Khalid Farzalur Rahaman & Ors [2000] 3 CLJ 739 CA ***(refd)***

Dato' Ahmad Johari Tun Abdul Razak v. A Santamil Selvi Alau Malay & Ors And Other Appeals [2020] 7 CLJ 588 CA ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2010] 9 CLJ 625 FC ***(refd)***

Datuk Seri Panglima Mohd Sari Datuk Hj Nuar v. Vee Seng Development Sdn Bhd & Ors [2009] 6 CLJ 102 CA ***(refd)***

DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor [2002] 2 CLJ 57 FC ***(refd)***

Hertfordshire Investments Ltd v. Bubb And Another [2000] 1 WLR 2318 ***(refd)***

Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah & Ors And Other Appeals [2023] CLJU 2226; [2023] 1 LNS 2226 CA ***(not foll)***

Ladd v. Marshall [1954] 3 All ER 745 ***(foll)***
Lam Kong Company Ltd v. Thong Guan Co Pte Ltd [2000] 3 CLJ 769 FC ***(refd)***
Lam Soon Cannery Co v. Hooper & Co [1965] CLJU 78; [1965] 1 LNS 78 FC ***(refd)***
Lau Foo Sun v. Government Of Malaysia [1970] CLJU 56; [1970] 1 LNS 56 FC ***(refd)***
Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors [2009] 6 CLJ 405 FC ***(refd)***
Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd [2005] 3 CLJ 238 CA ***(refd)***
Mirza Mohamed Tariq Beg Mirza Hh Beg v. Margaret Low Saw Lui & Ors [2012] CLJU 387; [2012] 1 LNS 387 CA ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***
Northman v. Barnett Council [1978] 1 WLR 221 ***(refd)***
Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988] 1 CLJ 31; [1988] 1 CLJ Rep 244 SC ***(refd)***
P'ng Hun Sun v. Dato' Yip Yee Foo [2013] CLJU 320; [2013] 1 LNS 320 CA ***(refd)***
Sin Heap Lee - Marubeni Sdn Bhd v. Yip Shou Shan [2004] 4 CLJ 35 CA ***(refd)***
Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal [2018] 2 CLJ 641 FC ***(refd)***
Teoh Kien Peng & Anor v. Thannimalai Subramaniam [2009] CLJU 308; [2009] 1 LNS 308 CA ***(refd)***
United Hokkien Cemetries, Penang v. The Board, Majlis Perbandaran Pulau Pinang [1979] CLJU 122; [1979] 1 LNS 122 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 4, 69(1), (2), (3)
Federal Constitution, arts. 160(2), 181(2), 182, 183
Interpretation Acts 1948 and 1967, s. 17A, (2)
Rules of the Court of Appeal 1994, rr. 7(1), (3), (3A), (a), (b), 105
Strata Titles Act 1985, ss. 4, 8A(1), (6), 9

For the appellants - Paari Perumal & Jayaratnam Kumarasamy; M/s Jayaratnam & Partners
For the respondent - Amalina Zainal Mokhtar; SFC & Mohamad Shafiq Mohd Sazali; FC

Reported by Lina E

JUDGMENT

Azimah Omar JCA:

Introduction

[1] The substantive appeal against the High Court's decision in dismissing the appellant's originating summons (to declare that the appellant's application for a certificate of proposed strata plan ("CPSP") under s. 8A of the Strata Titles Act 1985 ("STA") was in order and that the respondent's dismissal of the appellant's application was wrong and improper) is not yet before this court. It is to be noted that the CPSP is crucial for onwards subdivision and issuance of individual strata title under s. 9 of the same STA.

[2] The immediate issue for determination before us essentially concerns the appellant's notice of motion in encl. 24, whereby the appellant had moved this court to apply for leave to adduce new evidence relating to a different and prior strata development also undertaken by the appellant which the appellant contended would be material and relevant for the upcoming hearing of the substantive appeal (pursuant to s. 69 of the Courts of Judicature Act 1964 ("CJA")).

[3] These new evidences of the other prior strata development were somehow not exhibited by the appellant during the proceedings of the originating summon before the High Court below.

[4] These new evidences sought to be adduced/admitted in the hearing of the substantive appeal by the appellant were exhibited in the affidavit deposed by Lok Peng Chuan, the liquidator acting for the appellant filed in support of encl. 24.

[5] The appellant posits an argument that (by virtue of a recent Court of Appeal decision in *Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah & Ors And Other Appeals* [2023] CLJU 2226; [2023] 1 LNS 2226; [2024] 4 MLJ 907 ("*Krishnasamy*")) the courts no longer have to consider the requirements or conditions for admitting new evidence under r. 7(3A) of the Rules of Court of Appeal 1994 ("RCA 1994"), as the Court of Appeal in *Krishnasamy* had found that the provision was *ultra vires* the parent provision (and parent Act) of s. 69(2) of the Courts of Judicature Act 1974 ("CJA 1964"). Thus, the parties' submissions also turned to address the true context of the decision in *Krishnasamy*, and the prevailing status and position of r. 7(3A) of the RCA 1994.

[6] Considering the appellant's insistence above, the imminent issues for us to determine are: firstly, whether or not the appellant's reading of *Krishnasamy* was proper to its true context and secondly, whether or not we (the Court of Appeal) ought to follow the decision in *Krishnasamy* regarding an application to admit or adduce further evidence pursuant to s. 69 of the CJA (especially in light of the conditions prescribed under r. 7(3A) of the RCA 1994 before such further evidence be allowed to be admitted).

[7] The appellant in this case is Cempaka Mewah Sdn Bhd (in creditors' voluntary liquidation) (liquidators appointed on 17 April 2003) c/o KPMG Corporate Restructuring PLT, who is the developer of the housing development project known as Cape Nautica Villas ("CNV project"). The appellant was also the developer for the prior PD Marina International Resort Phase 2 (Straits View Villas) ("SVV project").

[8] The respondent is the director of surveying and Mapping Negeri Sembilan Darul Khusus who has the authority, among others, to issue a CPSP under s. 8A of the STA.

Brief Facts

[9] The appellant intends to proceed with subdivision and the issuance of individual strata titles under s. 9 of the STA. Thus, on 13 February 2017, the appellant submitted an application for the CPSP together with its supporting documents to the respondent *via* the surveyor appointed by the appellant which is Jurukur Pembangunan Sdn Bhd.

[10] Upon reviewing the application, the respondent discovered that the application was not in order and thereby dismissed the same on the grounds that:

(i) the car parks were not shown as an accessory parcel in the proposed strata plan although it was contained in section 6 of the fifth schedule of the sale and purchase agreement for the CNV project dated 16 August 1996 between the appellant and purchaser for the CNV project ("CM1"); and

(ii) the appellant merely submitted the certified true copy of the plan and not the original one approved or certified by the local planning authority.

[11] On 30 November 2021, the appellant filed an originating summons against the respondent in the High Court of Seremban. The appellant (the plaintiff in the court below) had initiated an action against the respondent ("the first defendant") and the Director of Inland and Mines Negeri Sembilan Darul Khusus ("the second defendant") for the following prayers:

(a) Satu perisytiharan (declaration) bahawa atas tafsiran sebenar (true construction) peruntukkan-peruntukkan dalam Perjanjian Jual beli antara Plaintif dan Pembeli bagi setiap unit (parcel) di projek pembangunan dikenali sebagai Cape Nautica Villas, H.S(D) 5308 L.O/PT 52, Lot 1309, Bandar Telok Kemang, Daerah Port Dickson (selepas ini dirujuk sebagai "Cape Nautica") ("perjanjian tersebut") dan peruntukkan-peruntukkan undang-undang yang terpakai pada masa yang material kepada perjanjian tersebut termasuk Housing Development (Control And Licensing) Act 1966 [Act 118], dan Akta Hakimilik Strata 1985 [Akta 318], tidak ada peruntukkan pelan petak aksesori (accessory parcel plan) khususnya untuk tempat letak kereta bersama dengan pembelian setiap unit (parcel) dibawah perjanjian tersebut;

(b) Satu perisytiharan (declaration) bahawa tidak ada keperluan disisi undang-undang untuk memperuntukkan pelan petak aksesori (accessory parcel plan) bagi tempat letak kereta didalam cadangan pelan strata yang telah dikemukakan kepada Defendan Pertama bersama permohonan untuk mendapatkan kelulusan sijil cadangan pelan strata dibawah seksyen 8A Akta Hakmilik Strata 1985 yang diperlukan untuk dikemukakan kepada Defendan Kedua untuk permohonan bagi pecah bahagi bangunan untuk keluaran Hakmilik Strata kepada setiap pembeli dalam projek Cape Nautica;

A (c) Satu perisytiharan (declaration) bahawa tindakan Defendan Pertama untuk enggan mengeluarkan sijil cadangan pelan strata atas syarat bahawa cadangan pelan strata yang dikemukakan tidak memperuntukkan pelan petak aksesori (accessory parcel plan) untuk tempat letak kereta adalah salah dan tidak selaras dengan peruntukkan undang-undang yang terpakai;

B (d) Satu perintah bahawa permohonan yang telah pun dikemukakan oleh Plaintif kepada Defendan Pertama untuk memperolehi sijil cadangan pelan strata menurut seksyen 8A Akta Hakmilik Strata 1985 adalah sempurna dan teratur;

C (e) Satu perintah bahawa Defendan Pertama diarahkan untuk meluluskan dan mengeluarkan sijil cadangan pelan strata untuk tindakan Plaintif selanjutnya dibawah seksyen 9 Akta Hakmilik Strata 1985;

(f) Kos tindakan ini ditanggung dan dibayar oleh Defendan Pertama; dan

D (g) Mahkamah Mulia ini memberikan Plaintif apa-apa perintah atau relif lain yang difikirkan sesuai dan adil dalam hal keadaan kes ini.

[12] A consent judgment was recorded between the appellant and the second defendant, where the second defendant had agreed as to the first to E fourth of the appellant's prayers. The trial then proceeded between the appellant and the respondent – first defendant.

[13] The respondent raised a preliminary objection that the appellant had utilised the wrong mode of commencement in bringing this action.

F **[14]** The High Court of Seremban dismissed the appellant's originating summons on 10 June 2022 and agreed that the application for the issuance of the individual strata title was improper and that the respondent had rightly denied the application for the CPSP on the following grounds:

(i) the appellant should have commenced an action for judicial review G under O. 53 of the Rules of Court 2012 (instead of an originating summon) as the suit is against a government's body and it is related to the exercising of the respondent's statutory duty under Act 318; and

(ii) the action of the respondent was made in accordance with the law as the Director of Surveying and Mapping has a statutory duty to ensure the H application was made in order before approving the CPSP and s. 8A(6) of the STA requires every strata plan to show the accessory parcel.

[15] The High Court further held that it is a settled principle that the parties are bound by the agreement that they have signed. The court in reviewing the agreement between the appellant and the purchaser discovered that I section 6 of the fifth schedule of the sale and purchase agreement clearly provides for the accessory parcel and that there is no other additional

agreement signed by the parties to change this. The appellant's contention that the car parks were common property was not mentioned in the agreement. Dissatisfied with the High Court's decision, the appellant filed the present appeal before us.

The Appeal Before Us

[16] The main issues that revolves around the substantive appeal are:

(i) whether the parking lot in the CNV project is an accessory parcel under the law; and

(ii) whether the prevailing law at the material time requires that the proposed strata plan for the CPSP application to clearly indicate and include accessory parcels.

Nevertheless, the above substantive issues shall only be dealt with later during the upcoming hearing of the substantive appeal.

[17] As mentioned earlier, *via* its encl. 24, the appellant sought leave from us to adduce new evidence in the upcoming substantive hearing of this appeal. The evidence sought to be referred to and relied on by the appellant are the documents marked as:

(i) "CM3" – a sale and purchase agreement dated 18 August 1994 between the appellant and a purchaser of a parcel in SVV project; and

(ii) "CM4" – a strata title No. PN 11590, No. Building M3, No. Level 7, No. Plot 317, District: Port Dickson, Negeri Sembilan which was issued for the parcel purchased under the "CM3".

[18] The appellant, in encl. 24, prayed as follows:

(a) Kebenaran diberikan kepada perayu untuk memfailkan permohonan ini, jika sesuai dan diperlukan;

(b) Kebenaran diberikan kepada perayu untuk merujuk kepada dua dokumen-dokumen yang dieksibitkan kepada affidavit Lok Peng Chuan yang diikrarkan dan difailkan bersama usul ini, khususnya perjanjian jual beli bertarikh 18.8.1994 dan hakmilik strata No Hakmilik PN 11590, No Bangunan M3, No Tingkat 7, No. Petak 317, Daerah Port Dickson, Negeri Sembilan sebagai keterangan di pendengaran rayuan disini kelak;

(c) Kos bagi dan berhubung dengan permohonan ini dijadikan kos dalam kausa rayuan;

(d) Perintah, arahan atau relif selanjutnya, berikutan dengannya bersampingan dengannya atau yang lain diberikan sebagaimana yang dianggap adil dan wajar oleh mahkamah yang mulia.

[19] The immediate question for our determination regarding encl. 24 is whether the intended further evidence, namely "CM3" and "CM4" can be admitted in the Court of Appeal at the upcoming hearing of its substantive appeal.

[20] We have perused the parties' affidavits, and the parties' respective written submissions and we are of the view that the motion in encl. 24 before us can be appropriately disposed by determining the following two issues:

(i) first issue: whether we should follow the strict and literal interpretation of s. 69(2) of the CJA 1964 and rr. 7(2) and (3A) of the RCA 1994 (as applied in the case of *Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah & Ors And Other Appeals* [2023] CLJU 2226; [2023] 1 LNS 2226; [2024] 4 MLJ 907) or prefer a purposive approach of interpretation so as to ascertain the mischief the provisions practically seek to remedy; and

(ii) second issue: whether the appellant's encl. 24 satisfies the requisites or threshold of admitting further evidence at appeal (as against our answer in the first issue).

First Issue: Whether We Should Follow The Strict And Literal Interpretation Of Section 69(2) Of The Court Of Judicature Act 1964 And Rules 7(2) And (3a) Of The Rules Of The Court Of Appeal 1994 (As Applied In The Case Of Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah & Ors And Other Appeals [2023] CLJU 2226; [2023] 1 LNS 2226; [2024] 4 MLJ 907) Or Prefer A Purposive Approach Of Interpretation So As To Ascertain The Mischief The Provisions Practically Seek To Remedy

The True Context And Finding In The Case Of *Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah & Ors And Other Appeals* [2023] CLJU 2226; [2023] 1 LNS 2226; [2024] 4 MLJ 907

[21] It is already well-established that the provisions (prior to the 1998 amendment of the Rules of the Court of Appeal 1994) governing the admissibility of new evidence at the appellate stage were ss. 69(2) and (3) of the CJA 1964 and r. 7(2) of the RCA 1994. Sections 69(2) and (3) of the CJA reads:

> (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.
>
> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.

[22] While r. 7(2) of the RCA 1994 reads:

> (2) Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

[23] Now, despite the statutory avenue for admittance of further evidence above, the Court of Appeal must not lose sight of the overriding primary role of the Court of Appeal as an appellate court, and the general rule that any court must act in promoting certainty and finality in litigation.

[24] It is trite that the Court of Appeal's appellate jurisdiction operates on the principle of non-intervention. Although an appeal is conducted as a re-hearing, it is crucial that as far as possible, the Court of Appeal ought not to disturb the High Court's findings of fact (unless there was plainly wrong judicial appreciation of evidence in the court below). We refer to the salutary words of the Federal Court in *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ 641; [2018] 2 MLJ 177:

> [95] In *McGraddie v. McGraddie And Another* [2013] 1 WLR 2477, the United Kingdom Supreme Court held that *an appellate court should not interfere with the trial court's conclusions on primary facts unless it was satisfied that the court was plainly wrong*; that the reasons justifying that approach were not limited to the fact that the trial judge was in a privileged position to assess the credibility of witnesses' evidence, but also included the fact that trial judges possessed expertise in determining issues of fact, that duplication of the trial judge's efforts on appeal was undesirable.
>
> [96] In *McGraddie*, the Supreme Court referred to the judgment of the majority of the Canadian Supreme Court in *Housen v. Nikolaisen* [2002] 2 SCR 235, which explained *why appellate courts are not in a favourable position to assess and determine factual matters: 'appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole'*.
>
> [97] Recently in *Henderson v. Foxworth Investments Ltd And Another* [2014] 1 WLR 2600, the United Kingdom Supreme Court held that in the absence of some other identifiable error, such as a material error of law or the making of a critical factual finding which had no basis in the evidence, *an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong'* in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached; and that if the appellate court was not satisfied that the decision came within that category it was irrelevant that, with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.
>
> (emphasis added)

[25] Thus, as a primary and general rule, the Court of Appeal should be slow to disturb the High Court's findings of fact, and should be even slower in allowing room for litigants to tender new evidences that were not furnished into the court below. Thus, although there is a distinct class of new evidence (subsequent evidence which was not in existence at the time of hearing at the court below) which does not require leave of the Court of Appeal to be admitted, the holistic spirit and purpose of the statutes (and the

principle of non-intervention) would dictate that there should be strict criteria and requisites that must be imposed before a litigant should be allowed to furnish new evidence at the appeal stage.

[26] With the above in mind, the Malaysian courts have since adopted additional conditions to further filter and sieve through 'intended' new evidence at appeal and to avoid abuse of that statutory mechanism and the appellate process. Those conditions are the three conditions as laid down by Denning LJ in the landmark English Court of Appeal decision in *Ladd v. Marshall* [1954] 3 All ER 745:

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: *first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible*.
>
> (emphasis added)

[27] The additional requirements were already adopted within the Malaysian courts and were codified within the law with statutory effect. This was aptly explained by the Court of Appeal in the case of *Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd* [2005] 3 CLJ 238; [2005] 5 MLJ 1:

> The power of this court to grant leave to admit fresh evidence at the hearing of the appeal is governed by s. 69(3) of the Courts of Judicature Act 1964 and r. 7(3A) of the Rules Court of Appeal 1994. *'The special grounds only referred to in s. 69(3) of the Courts of Judicature Act and the tests set out in r. 7(3A) of the Rules of the Court of Appeal 1994 are generally known as the Ladd v. Marshall [1954] 3 All ER 745 conditions*. It is settled by various decided cases that the three conditions are *cumulative and conjunctive in effect and are not disjunctive in that all the conditions must be fulfilled before such leave to admit fresh evidence be granted*. The said three conditions were also referred to by Thomson LP in *Lam Soon Cannery Co v. Hooper & Co* [1965] 2 MLJ 148 at p. 148 as follows:
>
> > It is common ground that applications of this sort are regarded by this court with considerable circumspection and the principles that have been applied in relation to them are stated as follows by Lord Denning in the case of *Ladd v. Marshall*:
> >
> > > To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, though it need not be incontrovertible.

I pause to observe that these conditions are not alternative; they are cumulative.

(emphasis added)

[28] The 1998 amendment to the RCA 1994 (*via* Rules of the Court of Appeal (Amendment) 1998 PU(A) 380/1998) codified the principle in *Ladd v. Marshall* within r. 7(3A) of the RCA 1994 which reads:

(3A) At the hearing of the appeal further evidence shall not be admitted unless the court is satisfied that:

(a) at the hearing before the High Court or the subordinate court, as the case maybe, the **new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available**; and

(b) the new evidence, if true, would have had or would have been likely to **have had a determining influence upon the decision** of the High Court or the subordinate court,as the case may be.

(emphasis added)

[29] Thereafter, the cumulative reading of ss. 69(2) and (3) of the CJA 1964, rr. 7(2), (3) and (3A) of the RCA 1994 were applied across the Board to all applications to tender and admit new evidence at the Court of Appeal stage.

[30] However, as we have highlighted above, the appellant in this case have contended that the additional criteria (special grounds) in *Ladd v. Marshall* (as codified within r. 7(3A) of the RCA 1994) were no longer applicable on the supposition that it was *ultra vires* against the parent provision of s. 69(2) of the CJA 1964. The appellant insisted that the provision was denounced to be invalid for being *ultra vires* by the Court of Appeal in *Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah & Ors And Other Appeals* [2023] CLJU 2226; [2023] 1 LNS 2226; [2024] 4 MLJ 907.

[31] However, we must emphasise that the appellant's reading and comprehension of the true context of the decision in *Krishnasamy* (*supra*) was erroneous and misconceived. In truth, the Court of Appeal in *Krishnasamy* did not declare r. 7(3A) of the RCA 1994 to be invalid as against s. 69(2) of the CJA 1964. Instead, the true context and essence of the decision in *Krishnasamy* was the strict and literal interpretation of the prevailing provisions and the literal identification of the different 'classes' of 'new evidence' (and identifying the corresponding appropriate treatment according to the different classifications of 'new evidence').

[32] In essence, the Court of Appeal in *Krishnasamy* found issue with the requirement as to leave (and the imposition of the special conditions under r. 7(3A) of the RCA 1994) as against a specific class of 'new evidence' which the Court of Appeal there had termed as "subsequent evidence" (referring to evidence that only existed or came into existence subsequent to the hearing

at the court below). The *Sin Heap Lee - Marubeni Sdn Bhd v. Yip Shou Shan* [2004] 4 CLJ 35; [2005] 1 MLJ 515; [2005] 3 AMR 570) identified three categories of 'further evidence':

> [20] Secondly, three categories of "further evidence" can be identified in the Relevant Statutory Provisions, namely:
>
> (1) "further evidence" which is intended to be *used by an applicant (Applicant) in interlocutory applications* in the CA [Further Evidence (Interlocutory CA application)];
>
> (2) "further evidence" which is intended to be relied on by an Applicant in the hearing of an appeal in the CA [Further Evidence (Appeal)] but the Further Evidence (Appeal) *only came into being after the hearing in the HC/Subordinate Court (Subsequent Evidence)*; and
>
> (3) Further Evidence (Appeal) *was available to the Applicant at the time of the hearing* in the HC/Subordinate Court *but was not adduced in the HC/Subordinate Court (existent evidence).*
>
> (emphasis added)

[33] Upon the classification above, the Court of Appeal in *Krishnasamy* took specific issue against the imposition of the requirement of leave and special conditions as against the class of further evidence of subsequent evidence. Hence, the case of *Krishnasamy* found that requirement of leave and the special conditions in r. 7(3A) of the RCA 1994 was *ultra vires* only if it was broadly applied against subsequent evidence (in which the admittance of subsequent evidence at appeal was specifically governed under s. 69(2) of the CJA 1964 and r. 7(2) of the RCA 1994). It was never declared that r. 7(3A) of the RCA 1994 was no longer valid:

> [22] *Rule 7(3A) of the RCA only applies to further evidence (appeal)* and not to further evidence (interlocutory CA application). Accordingly, the first part of s. 69(2) of the CJA and the first part of r. 7(2) of the RCA allow an applicant to use further evidence (interlocutory CA application) without any leave of CA.
>
> [23] *It is clear that r. 7(3A) of the RCA applies to existent evidence* and an applicant *can only discharge the burden to persuade the CA to grant leave* to admit the existent evidence at the hearing of the appeal in *CA if the two conditions (r. 7(3A)) are satisfied cumulatively*.
>
> [24] The question that arises is whether r 7(3A) of the RCA applies to subsequent evidence …
>
> (emphasis added)

[34] Thus, at this juncture, it was already apparent that the appellant's supposition on the 'total' invalidity of r. 7(3A) of the RCA 1994 is certainly erroneous and ill-conceived. Instead, the Court of Appeal in *Krishnasamy* only found that the special and additional conditions under r. 7(3A) of the RCA 1994 cannot apply as against "subsequent evidence" as s. 69(2) of the

CJA 1964 and r. 7(2) of the RCA 1994, literally provides that subsequent evidence may be admitted at the appeal stage without leave of the Court of Appeal:

> [25] In our view, leave of CA is not required for subsequent evidence because the secondpart of s. 69(2) of the CJA ('second part (s. 69(2) of the CJA)') and the second part of r. 7(2) of the RCA ('second part (r. 7(2) of the RCA)') have expressly allowed subsequent evidence to **be used in the hearing of appeals without any leave of CA**.
>
> (emphasis added)

[35] The decision in *Krishnasamy* was primarily grounded on the Court of Appeal's adoption of the literal interpretation of the prevailing provisions in the minority dissenting judgment of Abdul Aziz Mohamad JCA (as His Lordship then was) in *Sin Heap Lee - Marubeni Sdn Bhd v. Yip Shou Shan* [2004] 4 CLJ 35; [2005] 1 MLJ 515; [2005] 3 AMR 570 ("*Marubeni*").

[36] In *Marubeni*, the Court of Appeal also dealt with an application to admit new evidence at the appeal stage. The majority decision had dismissed the application firstly on the ground that the intended new evidence was not even existing evidence (as it was merely an affidavit deposing an assumption). Secondly, the majority decision also found that the new evidence (the mere assumption) did not satisfy the additional and special conditions prescribed under r. 7(3A) of the RCA 1994:

> [12] The second test as stated by para, (3A) is that the new evidence, if true, would have had or would have been likely to have a determining influence upon the decision of the High Court … In my view, the intended evidence of the alternative road would not affect the judge's decision on the award of damages suffered by the respondent …
>
> …
>
> [17] In my view, this is not evidence at all but only an assumption which the appellant could submit during the trial. In my view, there is no fresh evidence in the application at all.

[37] On the contrary, the minority dissenting judgment in *Marubeni* took a strict and literal approach on the specific words used particularly in s. 69(2) of the CJA 1964 and r. 7(2) of the RCA 1994. Abdul Aziz Mohamad JCA (as His Lordship then was) was of the view that the literal words within these two provisions:

(i) allows admittance of new 'subsequent evidence' at the appeal stage as a matter of right and without leave of the Court of Appeal;

(ii) do not expressly contain and impose any additional or special conditions for admittance of 'subsequent evidence' beyond the statutory allowance for such evidence to be admitted as a matter of right; and

(iii) thus, imposing the additional conditions under r. 7(3A) of the RCA 1994 against 'subsequent evidence' would be *ultra vires* as it would mean that the subsidiary provision in the RCA 1994 seeks to impose additional conditions beyond the prescribed threshold of the parent provision (parent Act) being the CJA 1964:

> [77] It is clear from sub-s. (2) that if the *further evidence* is as to matters which have *occurred after the decision* appealed from, it may be given 'in any case'. *No leave is required. The giving of further evidence as to post-decision matters is a matter of right*. It is also clear from the words 'save as to matters subsequent as aforesaid' in sub-s. (3) that the requirements of special grounds and of leave laid down by the sub-s do not apply to post-decision matters.
>
> [78] Except for the words 'Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals' in sub-s. (1), the whole of s. 69, all the five sub-sections of it, were, with very slight immaterial differences, reproduced in r. 7 of the Rules of the Court of Appeal 1994, the five sub-sections becoming the five paras of the rule in the same order. The effect of r. 7 was of course the same as that of s. 69. As far as post-decision matters are concerned, the giving of further evidence is a matter of right.
>
> [79] Now a provision of an Act of Parliament ought not be re-enacted in subsidiary legislation, because the re-enactment will be merely an echo that has no existence, life or force of its own. Remove it, and the law is still there in the Act. *Further, if the re-enactment is with modification, the modification is ultra vires and ineffective because it seeks to make modification in the law through subsidiary legislation* in an area that Parliament has enacted for, unless the power to modify is expressly given by Parliament. *The modification will inevitably have effects that are inconsistent with or repugnant to the provision as enacted by Parliament, and subsidiary legislation is incapable of doing that*.
>
> ...
>
> [82] *The changes brought about by para (3A) have not been made to s. 69*. Since para. (3A) seeks to cling to r. 7, and since r. 7 has no existence, life or force of its own, but is merely an echo of s. 69, r. (3A) is nothing more but an attempt by subsidiary legislation to modify s. 69. *The attempt is ultra vires because subsidiary legislation is not capable of modifying an Act of Parliament*, except by express authority of Parliament, which did not exist here.
>
> [83] *I was of the view, therefore, that s. 69 is not affected by para (3A) and further evidence as to post-decision matters may still be given, and as of right*. Therefore, merely as a formality to dispel any doubt, leave should be given to the appellants to give the further evidence that they sought to give. The question of its weight and effect would be matters to be considered in the appeal itself.
>
> (emphasis added)

[38] The aforementioned in-depth analysis and appreciation of the two decisions in *Krishnasamy* and *Marubeni* clearly dispel and debunk the appellant's misapprehension and misinterpretation of the true essence and context of the Court of Appeal decisions in both cases.

The Practicality And Logic To Depart From The Strict And Literal Approach Applied In *Krishnasamy* And *Marubeni* And To Prefer A Purposive Approach To Statutory Interpretation

[39] Notwithstanding, *albeit* that the strict and literal approach in interpreting the cumulative provisions applied in *Krishnasamy* and *Marubeni* might be sound (at least in the literal sense), we unfortunately (and with utmost respect) are pressed to remark that the same literal approach to statutory interpretation leads to an impractical, undesirable, and absurd consequence that would negate the true spirit of the RCA 1994 and the true purpose of the provisions. The grounds we say so are simply because:

(i) the special and distinct treatment as to admitting 'subsequent evidence' at appeal (as of right) would open the floodgate which is ripe for abuse by litigants to simply adduce new evidence (without formal application and leave) without any form of litmus test or preliminary filter for propriety, probative value, relevance, justice, and due regard to natural justice and finality of litigation;

(ii) without the formal procedures of a notice of motion and granting of leave, there would not even be any viable form of formal mechanism for any litigant to contend (and for the Court of Appeal to assess) whether or not any purported new evidence was either existent evidence or subsequent evidence. This would lead the Court of Appeal to be held at the mercy of the counterparty who would then be tasked with objecting and filing an opposing notice of motion to object or strike out the intended new evidence from the record of appeal. If the counterparty does not rise to this occasion, then there arises a possibility that improper new evidence would be admitted for the substantive appeal hearing;

(iii) this would effectively force the Court of Appeal to descend from the bench and enter the arena to indirectly argue for the counterparty against the wrongful admittance of the purported new evidence during the hearing of the substantive appeal. This would go against the overriding principle of non-intervention of the Court of Appeal's exercise of its appellate jurisdiction. For a court which adopts an adversarial system, it would be undesirable to expect the Court of Appeal to be the first party in line to maintain vigilance of impending 'new evidences' well before the respective counsels for all parties can appropriately and fully address and litigate the same before including the intended 'new evidences' within the record of appeal. It is only practical that this entire exercise be conducted by way of formal application and granting of leave;

(iv) there is no practical or logical reason to not apply the conditions in *Ladd v. Marshall* (as codified within r. 7(3A) of the RCA 1994) as against the class of subsequent evidence. Although the literal reading of the cumulative provisions would entail such classification and categorization of different 'new evidence', the application of the additional conditions under r. 7(3A) of the RCA 1994 can only serve to be beneficial as a practical filtration to ward off irrelevant or inconsequential new evidence from being admitted into the record of appeal;

(v) the application of the additional conditions under r. 7(3A) of the RCA 1994 across the Board for all types of 'new evidence' (without any distinction or classification) would best serve the purpose of the Court of Appeal as an appellate court under the overriding principle of non-intervention, the purpose of natural justice, while promoting due diligence in the prosecution of a case, and finality in litigation, as well as remedying the mischief of the abuse of process of the court to either unnecessarily disrupt finality in litigation, or admittance of irrelevant and inconsequential new evidence at the appeal stage;

(vi) thus, although the literal reading of the provisions would allow admittance of subsequent evidence as of right, it would certainly be impractical and undesirable that the Court of Appeal to be inundated with the tendering and admittance of new evidence without any formal mechanism of assessment or evaluation (as to its propriety and relevance). Not all subsequent evidence would be relevant and material to an appeal. Thus, it would also be impractical and undesirable that the hearing of the substantive appeal be inundated with preliminary matters as to admissibility of new evidence (which should have been fully addressed, litigated, and determined in a prior determination of a notice of motion and the granting or dismissal of leave); and

(vii) it would also be impractical and undesirable to admit any class of new evidence as of right (without the mechanism of a formal application and granting of leave) as the record of appeal then would be left open for abuse (to include new documents that were not admitted at the court below) without any identifiers for the Court of Appeal and even the parties to ascertain between documents already tendered at the court below and new evidence that either party seeks to admit at appeal. It would lead to the unnecessary complication and arduous (and tedious) task for the Court of Appeal and the counterparty to look at the record of appeal with suspicion and vigilance to identify 'new evidence' from the massive pool of documents already within the record of appeal.

[40] Considering all of the above, it is apparent that a literal interpretation of the cumulative provisions would lead to absurdity as the cumulative provisions would effectively negate the very purpose of the Court of Appeal as the vestige for swift, diligent, effective, efficient, and just appellate arbiter

within a reasonable perimeter of the principle of non-intervention. In such a circumstance, the Federal Court and even our statutory law had prescribed an avenue for the courts to depart from a strict and literal approach to statutory interpretation and prefer a purposive approach to statutory interpretation. This had been entrenched in our statutory law under s. 17A of the Interpretation Acts 1948 and 1967 which reads as follows:

> In the interpretation of a provision of an Act, **a construction that would promote the purpose or object underlying the Act** (whether that purpose or object is expressly stated in the Act or not) **shall be preferred** to a construction that would not promote that purpose or object.
>
> (emphasis added)

[41] Lord Denning MR first championed the purposive approach to statutory interpretation and famously reminded that the courts ought not be so tightly bound to the literal words of a statute, and even modify the words of a provision, if necessary so as to cater to circumstances or situations that the parliament might not have had in mind at the time of passing the law. We refer to the famous words of Lord Denning MR in the case of *Northman v. Barnett Council* [1978] 1 WLR 221:

> In all cases *now in the interpretation of statutes, we adopt such a construction as will 'promote the general legislature purpose' underlying the provision. It Is No Longer Necessary For Judges To Wring Their Hands And Say: 'There Is Nothing We Can Do About It*'. Whenever the strict interpretation of a statute gives rise to an *absurd and unjust situation*, the judges can and should *use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done*, had they had the situation in mind.
>
> (emphasis added)

[42] Closer to home, the Federal Court in *United Hokkien Cemetries, Penang v. The Board, Majlis Perbandaran Pulau Pinang* [1979] CLJU 122; [1979] 1 LNS 122; [1979] 2 MLJ 121 also expressed the same sentiment in preferring a purposive approach over a strict literal interpretation of a statute:

> Then, in my view, it is a matter for the **purposive approach to replace the literal**. As was said by Lord Diplock in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at p. 899, the **literal method of construction is now completely out of date and has been replaced by a 'purposive approach***'*. It ought to be noted that this purposive approach is not a modem fashion. Since the 17th century, it has been the task of the judiciary to interpret an Act 'according to the intent of them that made it': Coke 4 Inst 330.
>
> (emphasis added)

[43] A more recent case would be the Federal Court's decision in *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57; [2002] 2 MLJ 11 ("*Dikim Holdings*") in which the Federal Court had preferred the purposive approach of interpretation to the extent of omitting express words within an article of the

Federal Constitution. In *Dikim Holdings,* an absurdity arose when the exclusive jurisdiction of the special court over 'rulers' was sought be extended also to other persons (who were not rulers but were exercising the functions of a ruler). The Federal Court identified that the legislative intent and purpose of the amendment to art. 181(2) and the addition of arts. 182 and 183 of the Federal Constituion was to remove a ruler's total legal immunity while affording a ruler an exclusion from the jurisdiction of an ordinary court (to be subjected to the exclusive jurisdiction of a special court).

[44] Thus, despite the fact that the term 'ruler' under art. 160 of the Federal Constitution expressly included "a person who in accordance with the Constitution of that state exercises the functions of the ruler", the Federal Court still preferred the purposive approach to statutory interpretation, and decided that the exclusive jurisdiction of the special court cannot be extended to cover anyone else other than the Ruler himself:

> ... *Granted that the meaning of 'Ruler' in art. 160(2) remaining intact*, it can give rise to two interpretations of 'Ruler' for art. 181(2) and arts. 182 and 183:
>
> (a) article 181(2) does not extend to a person exercising the functions of the Ruler.
>
> (b) articles 182 and 183 would appear to include a person exercising the functions of the Ruler.
>
> *That is if the literal approach of interpretation is taken. Such an interpretation would lead to an ambiguity and absurdity as a Regent exercising the functions of the Ruler is not a Ruler for the purposes of art. 181(2)*, the Third Schedule and the Fifth Schedule and hence the Regent can be sued in the ordinary courts as the establishment of the special court by the amendment to art. 181(2) is exclusively reserved to the Rulers personally in respect of actions in their personal capacity but for the purposes of arts. 182 and 183, he is the Ruler and shall sue or be sued in the special court for the reason that the meaning of 'Ruler' in art. 160(2) para (b) remain intact.
>
> ...
>
> *In order to resolve the ambiguity or absurdity situation, we need to consider the purpose or object of establishing the special court*, that is, whether the exclusive jurisdiction of the special court to try offences committed in the Federation by the Ruler of a State and all civil cases by or against the Ruler of a State notwithstanding where the cause of action arise is to include a person exercising the functions of the Ruler of a State as in the case of the plaintiff here?
>
> As stated earlier *s. 17A of the Acts* (effective from 24 July 1997 *vide* Act A996/97) now *permits for a purposive approach* quite apart from the authorities cited earlier on. It has been given, so to say, statutory recognition.
>
> (emphasis added)

[45] In the same manner above, despite the fact that s. 69(2) of the CJA 1964 and r. 7(2) of the RCA 1994 expressly provided that subsequent evidence may be admitted at appeal without leave of the Court of Appeal, a purposive interpretation of all of the relevant provisions would entail that allowing such free rein to admit new evidence (of any classification) without leave would run contrary to the legislative intent of the true purpose and design of the Court of Appeal's appellate role and jurisdiction.

(See also Federal Court in *Lam Kong Company Ltd v. Thong Guan Co Pte Ltd* [2000] 3 CLJ 769; [2000] 4 MLJ 1; Court of Appeal in *Citibank Bhd v. Mohamad Khalid Farzalur Rahaman & Ors* [2000] 3 CLJ 739; [2000] 4 MLJ 96 and *Boulevard Plaza Sdn Bhd v. Gas District Cooling (Putrajaya) Sdn Bhd & Another Appeal* [2020] 7 CLJ 1; [2021] 1 MLJ 391 where both the Federal Court and Court of Appeal had recently preferred the purposive approach over a literal interpretation of statutory provisions).

[46] The entire length of deliberation above considered, we hereby answer the first issue in the negative. We respectfully should depart from the strict and literal interpretation of s. 69(2) of the Courts of Judicature Act 1964 and rr. 7(2) and (3A) of the RCA 1994 (as applied in the case of *Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah & Ors And Other Appeals* [2023] CLJU 2226; [2023] 1 LNS 2226; [2024] 4 MLJ 907) and instead prefer a purposive approach of statutorty interpretation so as to ascertain the legislative intent and mischief the provisions practically seek to remedy.

Second Issue: Whether The Appellant's Enclosure 24 Satisfies The Requisites Or Threshold Of Admitting Further Evidence At Appeal (As Against Our Answer In The First Issue)

[47] In view of our answer in the first issue above, it is now crystal clear that the special conditions of *Ladd v. Marshall* (as codified under r. 7(3A) of the RCA 1994) shall be cumulatively and conjunctively applied as against all applications to admit further evidence (notwithstanding any type or class of new evidence). Therefore, it remains incumbent against the appellant to prove that CM3 and CM4 were either not available, or were unattainable even with reasonable diligence at the time of the hearing at the court below. The appellant then must also prove that these two pieces of documents from the prior SVV project would likely have influenced the decision of the High Court below.

[48] With a clear threshold set above, it is apt to identify in exactitude, what CM3 and CM4 were which the appellant so insistent in admitting at appeal. Now, we were made to understand that the SVV project was a prior project also undertaken by the appellant 15 years ago prior to the High Court's decision to dismiss the appellant's originating summon on 10 June 2022. CM3 *per se* was one of the sale and purchase agreements dated 18 August 1994 concluded under the SVV project while CM4 was one of the individual strata titles issued under the SVV project on 29 June 2007.

A **[49]** The appellant asserted that the SVV project was similar to the CNV project which is the subject project of this appeal. Section 6 of the fifth schedule of CM3 which reads "accessory parcel with one car-parking lot only to be designated by the vendor is identical to section 6 of the fifth schedule of CM1 which reads "accessory parcel with one car-parking lot
B only to be designated by the vendor".

[50] Despite the similarity, the appellant contended that the application for the CPSP was approved by the respondent and a strata title was later issued for the SVV project as evidenced in "CM4". The said strata title was issued without the car parks being reflected as an accessory parcel. Thus, the
C appellant intends to rely on CM3 and CM4 to prove that the respondent should have approved the appellant's application for CPSP for the CNV project as the proposed strata plan for the CNV project similarly did not reflect the car parks as accessory parcels.

[51] Both CM3 and CM4 were old documents which were already in
D existence for more than a decade before the hearing of the appellant's originating summon. And considering that SVV was a project undertaken by the appellant itself, it is only logical and reasonable that the appellant had full access to the same at all material times. Thus, it cannot at all be argued that the intended new evidence was 'not available' or were unobtainable with
E reasonable diligence by the appellant. Thereto, the appellant would have already failed to satisfy the first limb of the prerequisites under r. 7(3A) of the RCA 1994.

[52] We were also made to understand that the statutory requirement under the s. 8A(2) of the STA for the inclusion of accessory parcels within the
F proposed strata plan (for an application for CPSP) only came into force on 1 June 2015 *via* the Strata Title (Amendment) Act 2013 (Act A1450). This would explain the different treatment by the respondent as against the prior SVV project *circa* 1994 as the law prior to the amendment did not require accessory parcels to be included within the proposed strata plan.

G **[53]** Thus, since the law has changed post-amendment and addition of s. 8A of the STA, then it was well within the ambit of the law for the respondent to dismiss the appellant's CPSP application for the statutory non-compliance against the prevailing s. 8A(2) of the STA. In consequence, it remains irrefutable that both CM3 and CM4 would not have any relevance or
H influence on the decision of the High Court below had it been tendered into court at the time the appellant's originating summon was heard. Therefore, it is resoundingly clear to us that the appellant had failed to satisfy all of the statutory requirements to justify the admittance of CM3 and CM4 as new evidence for the upcoming hearing of the appellant's substantive appeal.

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[54] All of the deliberation under this heading considered, we hereby answer the second issue in the negative. The appellant's encl. 24 did not satisfy all of the statutory requirements to justify the admittance of CM3 and CM4 as further evidence at appeal.

Our Decision

[55] We are of the view that the appellant's encl. 24 is totally devoid of merit and we hereby dismiss the appellant's encl. 24 with costs.

[56] Finally, we order that the appellant does pay costs of RM5,000 to the respondent subject to allocatur.

Wong Kian Kheong JCA:

Introduction

[57] In court enclosure no. 24 (encl. 24), the liquidators (liquidators) of the appellant's company (appellant) (in a creditors' voluntary liquidation) had applied for leave of the Court of Appeal to adduce two documents (two documents) for the purpose of the hearing of the above appeal (this appeal). The two documents were available during the proceedings in the High Court but were however not adduced as evidence in the High Court.

[58] We have unanimously dismissed encl. 24 with costs (decision (encl. 24)).

[59] My learned sister, Azimah binti Omar JCA, had earlier forwarded a draft judgment (Azimah Omar JCA's draft) for the decision (encl. 24) to my learned sister, Hanipah binti Farikullah FCJ (who presided over this panel), and I.

[60] I had perused Azimah Omar JCA's draft. Regrettably, I am unable to concur with the grounds stated therein. Hence, I had prepared a draft of this judgment which contained my grounds for the decision (encl. 24). A copy of this draft had been given to my learned sisters, Hanipah Farikullah FCJ and Azimah Omar JCA.

Background

[61] The appellant was a developer of a housing development project known as "Cape Nautica Villas" which was built on Lot 1309, PN11588, Bandar Telok Kemang, Port Dickson (CNV project).

[62] Parcels in the CNV project (parcels) were sold by the appellant to various purchasers (parcel owners) pursuant to sale and purchase agreements (SPA (CNV project)) in the form of Schedule H of the Housing Development (Control and Licensing) Regulations 1989 (Schedule H).

[63] The respondent is the Director of Survey and Mapping for the State of Negeri Sembilan (respondent).

[64] For the purpose of the preparation, registration and issuance of strata titles to the parcel owners, the appellant submitted a draft "certificate of proposed strata plan" (appellant's draft CPSP) for the respondent to issue a certificate of proposed strata plan under s. 8A of the Strata Titles Act 1985 (STA).

[65] According to the appellant, based on an interpretation of the relevant provisions in the SPA (CNV project), Schedule H, Housing Development (Control and Licensing) Regulations 1989 and STA, the draft CPSP did not include car parks to the parcels as "accessory parcels" (as understood in s. 4 of the STA). In a letter dated 15 April 2021 to the appellant, the respondent however disagreed with the appellant's above legal stand. Hence, the respondent did not issue the draft CPSP as per the appellant's draft CPSP (respondent's decision).

[66] On 30 November 2021, on behalf of the appellant, the liquidators filed an originating summons in the High Court against, among others, the respondent for, among others, a declaration that the respondent's decision was invalid (OS).

[67] The High Court dismissed the OS with costs on 10 June 2022 (High Court's decision). Hence, this appeal against the High Court's decision.

[68] In encl. 24, the appellant sought leave of the Court of Appeal to use the two documents for the hearing of this appeal. The two documents had not been adduced by the appellants during the hearing of the OS in the High Court. With regard to the two documents:

(i) before the development of CNV project, the appellant had developed a housing project named "Straits View Villas" which was built on HS (D) No. 5307 PT 51, Mukim Si Rusa, Negeri Sembilan (SVV project); and

(ii) the two documents concerned SVV project (not CNV project) and were:

(a) a sale and purchase agreement dated 18 August 1914 between one purchaser of a parcel in SVV project, namely Puan Nor Ashikin bt Ahmad Mokhtar (parcel owner (SVV project)), with the appellant (SPA (SVV project)). The contents of the SPA (SVV project) were prescribed by Schedule H and were similar to the contents of the SPA (CNV project); and

(b) a strata title which had been registered in the name of the parcel owner (SVV project) (Strata Title (SVV project)). The Strata Title (SVV project) did not provide for the car park to be an accessory parcel.

Submissions By Parties

[69] In support of encl. 25, the liquidators' learned counsel, Mr Paari Perumal, had contended as follows:

(i) s. 69 of the Courts of Judicature Act 1964 (CJA) provides the Court of Appeal with "full discretionary power" to receive fresh evidence for the hearing of appeals notwithstanding the fact that such evidence has not been adduced at the High Court;

(ii) based on:

(a) the dissenting judgment of Abdul Aziz Mohamad JCA (as he then was) in the Court of Appeal case of *Sin Heap Lee - Marubeni Sdn Bhd v. Yip Shou Shan* [2004] 4 CLJ 35; [2005] 1 MLJ 515; and

(b) the Court of Appeal's decision in *Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah & Ors And Other Appeals* [2023] CLJU 2226; [2023] 1 LNS 2226; [2024] 4 MLJ 907:

(i) r. 7 (3A) of the Rules of the Court of Appeal 1994 (RCA) cannot fetter the Court of Appeal's discretion under s. 69 of the CJA to admit fresh evidence which can be used in an appeal;

(iii) Abdul Malik Ishak JCA had decided in the following two Court of Appeal cases:

(a) *Teoh Kien Peng & Anor v. Thannimalai Subramaniam* [2009] CLJU 308; [2009] 1 LNS 308; [2009] CLJU 308; [2009] 1 LNS 308; and

(b) *Datuk Seri Panglima Mohd Sari Datuk Hj Nuar v. Vee Seng Development Sdn Bhd & Ors* [2009] 6 CLJ 102.

(i) that the judgment of Denning LJ (as he then was) in United Kingdom's (UK) Court of Appeal case of *Ladd v. Marshall* [1954] 3 All ER 745 should not be applied to curtail our Court of Appeal's discretion to admit fresh evidence for their use in the hearing of an appeal;

(iv) there were "special grounds" within the meaning of s. 69(3) of the CJA for the Court of Appeal to allow the two documents to be used by the appellant in this appeal because there was a "nexus" between the two documents and the facts of this case; and

(v) in the interest of justice, the Court of Appeal has inherent powers (reserve powers) to admit the two documents for the hearing of this appeal.

[70] The respondent's learned Senior Federal Counsel, Puan Amalina binti Zainal Mokhtar, resisted encl. 24 on the following grounds:

(i) the Court of Appeal can only admit fresh evidence for the hearing of an appeal if such evidence fulfils s. 69 of the CJA and r. 7(3A) of the RCA;

(ii) the test laid down in *Ladd* should be applied for encl. 24. In fact, *Ladd* had been applied by the following two Malaysian cases:

A (a) the Federal Court in *Chai Yen v. Bank Of America National Trust & Savings Association* [1980] CLJU 6; [1980] 1 LNS 6; [1980] 2 MLJ 142; and

(b) the Court of Appeal's judgment in *Dato' Ahmad Johari Tun Abdul Razak v. A Santamil Selvi Alau Malay & Ors And Other Appeals* [2020] 7 CLJ 588; [2020] 6 MLJ 133;

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(iii) premised on s. 69 of the CJA, r. 7(3A) of the RCA and the test decided in *Ladd*, encl. 24 should be dismissed with costs because:

(a) the two documents were always in the possession of the appellant and with reasonable diligence, the appellant could have adduced the two documents as evidence at the hearing of the OS in the High Court; and

C

(b) the two documents had no "determining influence" on this appeal due to the following reasons:

D

(1) the two documents concerned a housing development project (SVV project) which was different from the CNV project, the subject matter of this appeal; and

(2) the Strata Title (SVV project) was registered on 29 June 2007 (before the enforcement of s. 8A(6) of the STA regarding accessory parcels (which only took effect on 1 June 2015)).

E

Does The Court Of Appeal Have The Power Under Rule 105 of the RCA, Inherent Jurisdiction And/Or Inherent Power To Admit Further Evidence For The Hearing Of An Appeal?

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[71] Reproduced below are ss. 69(1) to (3) of the CJA, rr. 7(1) to (3), (3A) and 105 of the RCA:

s. 69 CJA *Hearing of appeals*

(1) *Appeals to the Court of Appeal shall be by way of re- hearing, and in relation to such appeals the Court of Appeal shall have all the powers* and duties, as to amendment or otherwise, o*f the High Court, together with full discretionary power to receive further evidence by oral examination in court or through a remote communication technology, by affidavit, or by deposition taken before an examiner or commissioner.*

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H (2) *The further evidence may be given without leave on interlocutory applications, or in any case as to matter which have occurred after the date of the decision from which the appeal is brought.*

(3) *Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.*

I

RCA

r. 7 *Power of Court to* amend, *admit further evidence*, or draw inferences of fact

(1) *The Court shall have all the powers* and duties, as to amendment or otherwise, *of the appropriate High Court, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by deposition taken before an examiner or Commissioner.*

(2) *Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.*

(3) *Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court.*

(3A) *At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that:*

(a) *at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and*

(b) *the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.*

r. 105 Inherent powers of the Court

For the avoidance of doubt, it is declared that nothing in [RCA] shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

(emphasis added).

[72] Firstly, ss. 69(1) to (3) of the CJA, rr. 7(1) to (3) and (3A) of the RCA (referred collectively in this judgment as the "relevant provisions") use the term "further evidence" to refer to evidence which had not been adduced in the High Court but a party to an appeal to the Court of Appeal, has sought to use the further evidence for the hearing of the appeal. In the same vein, many cases have used the term "fresh evidence". Hence, for the purpose of this judgment, the term "further evidence" bears the same meaning as "fresh evidence".

[73] I am not able to accept the reliance by the appellant's learned counsel on the inherent or reserve powers of the Court of Appeal. This is because in view of the express relevant provisions which provide for the Court of Appeal's discretionary power with regard to further evidence, there cannot be any resort to r. 105 of the RCA, the Court of Appeal's inherent jurisdiction and/or inherent power. In this regard, I rely on the following two judgments of our apex courts:

A (i) the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in *Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors* [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244; [1988] 1 MLJ 178, at 181; and

B (ii) the judgment of Zulkefli Ahmad Makinudin FCJ (as he then was) in the Federal Court case of *Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors* [2009] 6 CLJ 405; [2009] 6 MLJ 307, at [28].

Three Scenarios

[74] It is decided in *Krishnasamy*, at [20], that the relevant provisions C envisage three factual scenarios (three scenarios) as follows:

> [20] *Secondly, three categories of "further evidence" can be identified in the Relevant Statutory Provisions, namely:*
>
> (1) *"further evidence" which is intended to be used by an applicant (Applicant) in interlocutory applications in the CA [Further Evidence (Interlocutory CA* D *Application)];*
>
> (2) *"further evidence" which is intended to be relied on by an Applicant in the hearing of an appeal in the CA [Further Evidence (Appeal)] but the Further Evidence (Appeal) only came into being after the hearing in the HC/ Subordinate Court (Subsequent Evidence); and*
>
> E (3) *Further Evidence (Appeal) was available to the Applicant at the time of the hearing in the HC/Subordinate Court but was not adduced in the HC/ Subordinate Court (existent evidence).*
>
> (emphasis added)

[75] The three scenarios provided in the relevant provisions are as follows: F

(i) a party to an appeal, be it an appellant or respondent (party (appeal)) wishes to use further evidence in an "interlocutory application" in the Court of Appeal (first scenario). The first scenario is provided in:

G (a) the first limb of s. 69(2) of the CJA (further evidence may be given without leave on interlocutory applications) (first limb (s. 69(2) of the CJA)); and

(b) the first limb of r. 7(2) of the RCA (further evidence may be given without leave on interlocutory applications) (first limb (r. 7(2) of the RCA)).

H In respect of the meaning of an "interlocutory application" in the first limb (s. 69(2) of the CJA) and first limb (r. 7(2) of the RCA), I rely on the following judgment of Arifin Zakaria CJ (Malaya) (as he then was) in *Dato' Seri Anwar Ibrahim v. PP* [2010] 9 CLJ 625; [2010] 6 MLJ 585, at [21]: I

> [21] *The term 'interlocutory' used therein is specifically in reference to civil matter as opposed to a criminal matter (see para 501 of the Halsbury's Laws of England, (4th Ed), Vol 26). It includes an order made before and after judgment in a matter before the court*.
>
> (emphasis added)

As explained in *Dato' Seri Anwar Ibrahim*, the first scenario applies to an "interlocutory application", namely an application to the Court of Appeal for an "interlocutory order" before and after the Court of Appeal has disposed of the appeal in question. It is to be noted that after an appeal has been disposed of by the Court of Appeal (Court of Appeal's order (appeal)), a party (appeal) may apply to the Court of Appeal for an interlocutory stay of execution of the Court of Appeal's order (appeal) pending the disposal of an application by the party (Appeal) for leave of the Federal Court to appeal against the Court of Appeal's order (appeal);

(ii) in the second scenario (second scenario), for the purpose of the hearing of an appeal, a party (appeal) relied on evidence which only came into being after the decision of the High Court (subsequent evidence). The following relevant provisions provide for the second scenario:

(a) the second limb of s. 69(2) of the CJA (in any case as to matters which have occurred after the date of the decision from which the appeal is brought) (second limb (s. 69(2) of the CJA));

(b) section 69(3) of the CJA (upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, *save as to matters subsequent as aforesaid*, shall be admitted on special grounds only, and not without leave of the court) (emphasis added);

(c) the second limb of r. 7(2) of the RCA (in any case as to matters which have occurred after the date of the decision from which the appeal is brought) (second limb (r. 7(2) of the RCA)); and

(d) r. 7(3) of the RCA (upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, **save as to matters subsequent as aforesaid**, shall be admitted on special grounds only, and not without leave of the Court) (emphasis added);

(iii) in the last scenario (third scenario), a party (appeal) wished to use evidence in an appeal which was available before the High Court's decision but such evidence was not adduced at the trial in the High Court (existent evidence). The third scenario is provided in the following relevant provisions:

(a) s. 69(3) of the CJA; and

(b) rr. 7(3), (3A)(a) and (b) of the RCA.

A

First Scenario (Interlocutory Applications In The Court Of Appeal)

[76] According to *Krishnasamy*, at [22]:

> [22] *Rule 7(3A) of the RCA only applies to Further Evidence (Appeal) and not to Further Evidence (Interlocutory CA Application). Accordingly, the first part of s. 69(2) CJA and the first part of r. 7(2) of the RCA allow an Applicant to use Further Evidence (Interlocutory CA Application) without any leave of CA.*
>
> (emphasis added)

B

[77] Enclosure 24 was not an "interlocutory application" in the Court of Appeal because in encl. 24, the appellant did not apply for any interlocutory order from the Court of Appeal. On the contrary, by way of encl. 24, the appellant sought leave of the Court of Appeal to use existent evidence (in the form of the two documents) for the hearing of this appeal. It is therefore clear that encl. 24 concerned the third scenario (regarding existent evidence).

C

Second Scenario (Concerning Subsequent Evidence)

D

[78] With regard to the second scenario (which concerned subsequent evidence), it was decided in *Krishnasamy*, at [23] to [26], as follows:

> [23] *It is clear that r. 7(3A) of the RCA applies to existent evidence and an Applicant can only discharge the burden to persuade the CA to grant leave to admit the existent evidence at the hearing of the appeal in CA if the 2 Conditions [r. 7(3A)] are satisfied cumulatively.*

E

> [24] *The question that arises is whether r. 7 (3A) of the RCA applies to Subsequent Evidence. In the [Court of Appeal] case of Sin Heap Lee - Marubeni Sdn Bhd v. Yip Shou Shan [2005] 1 MLJ 515:*

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> ...
>
> (2) *Abdul Aziz Mohamad JCA (as he then was) delivered the following dissenting judgment [dissenting judgment (Sin Heap Lee-Marubeni)],* at [73] to [83]:
>
> > [73] *The appellants applied, by a notice of motion, for leave, 'in the event that leave is necessary', to adduce further evidence in their appeal. The further evidence was as to a matter that occurred after the date of the decision of the High Court in this case, namely, evidence of extensive earthworks that were being carried out on the respondent's land that, it was claimed, would bring down the 'platform levels' of the land. The main purpose of the evidence was to prove that there would no longer be any need to construct a retaining wall to stabilize the slope of the respondent's land or, even if a retaining wall was still required, that its cost would be greatly reduced 'due to loss of land surcharge (weight of soil)', so that the compensatory damages would now not be as much as the RM3.6 million that was awarded.*
> >
> > [74] *The respondent opposed the application. In his affidavit he contended, among other things, that the recent earthworks did not affect the height and configuration of the slope, that it is not permissible to ask the appellate court to reassess damages that have been properly assessed at the trial and that, in any event, the evidence failed to satisfy the three conditions for its reception.*

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H

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I understood the three conditions to be those that may be drawn from [r. 7(3A) of the RCA].

[75] *We heard the application before commencing to hear the appeal. It was dismissed by a majority decision without hearing learned counsel for the respondent. I was of the view, after hearing the submission of the appellants' learned counsel and not having the opportunity to hear the submission of the respondent's learned counsel, that the application should be allowed. I proceed to state my reasons.*

[76] *The question of the giving and reception of further evidence for civil appeals to the Court of Appeal is dealt with in s. 69 [CJA]...*

[77] *It is clear from sub-s (2) that if the further evidence is as to matters which have occurred after the decision appealed from, it may be given 'in any case'. No leave is required. The giving of further evidence as to post-decision matters is a matter of right. It is also clear from the words 'save as to matters subsequent as aforesaid' in sub-s (3) that the requirements of special grounds and of leave laid down by the sub-s do not apply to post-decision matters.*

[78] *Except for the words 'Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals' in sub-s. (1), the whole of s. 69, all the five sub-sections of it, were, with very slight immaterial differences, reproduced in r. 7 [RCA], the five sub-sections becoming the five paras of the rule in the same order. The effect of r. 7 was of course the same as that of s. 69. As far as post-decision matters are concerned, the giving of further evidence is a matter of right.*

[79] *Now a provision of an Act of Parliament ought not be re-enacted in subsidiary legislation, because the re-enactment will be merely an echo that has no existence, life or force of its own. Remove it, and the law is still there in the Act. Further, if the re-enactment is with modification, the modification is ultra vires and ineffective because it seeks to make modification in the law through subsidiary legislation in an area that Parliament has enacted for, unless the power to modify is expressly given by Parliament. The modification will inevitably have effects that are inconsistent with or repugnant to the provision as enacted by Parliament, and subsidiary legislation is incapable of doing that.*

[80] *I have to say all that because in 1998 r. 7 was amended by introducing the following para (3A): ...*

...

[81] *That is the paragraph that I mentioned earlier in connection with the three conditions to be satisfied. It imposes restrictions where none existed before. Further, the requirement in para (b) that the new evidence would have had or would have been likely to have had a determining influence on the decision that was made, read with para (a), would suggest that further evidence would only be allowed as to matters in existence before the decision, whereas previously further evidence as to post-decision matters was allowed, and as of right too.*

A

[82] *The changes brought about by para (3A) have not been made to s. 69. Since para (3A) seeks to cling to r. 7, and since r. 7 has no existence, life or force of its own, but is merely an echo of s. 69, r. 7(3A) is nothing more but an attempt by subsidiary legislation to modify s. 69. The attempt is ultra vires because subsidiary legislation is not capable of modifying an Act of Parliament, except by express authority of Parliament, which did not exist here.*

B

[83] *I was of the view, therefore, that s. 69 is not affected by para (3A) and further evidence as to post-decision matters may still be given, and as of right. Therefore, merely as a formality to dispel any doubt, leave should be given to the appellants to give the further evidence that they sought to give. The question of its weight and effect would be matters to be considered in the appeal itself.*

C

[25] *In our view, leave of CA is not required for Subsequent Evidence. because the second part of s. 69(2) CJA (2nd Part [s. 69(2) CJA]) and the second part of r. 7(2) of the RCA (2nd Part [r. 7(2) of the RCA]) have expressly allowed Subsequent Evidence to be used in the hearing of appeals without any leave of CA. In this regard*:

D

(1) *the Majority Judgment (Sin Heap Lee-Marubeni) had dismissed the application for leave of CA to adduce "further evidence" on the ground that the application was based on an "assumption" and there was no "further evidence" to be adduced at the hearing of the appeal in that case. Furthermore, the Majority Judgment (Sin Heap Lee-Marubeni) did not discuss the 2nd Part [s. 69(2) CJA] and 2nd Part [r. 7(2) of the RCA]; and*

E

(2) *we take the opportunity to approve the dissenting judgment (Sin Heap Lee-Marubeni) which can be supported by the following reasons:*

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(a) *according to s. 2(1)(e) of the Interpretation Acts 1948 and 1967 (IA), Part I IA applies to RCA because RCA are made after 31.12.1968 pursuant to CJA which has been revised under the Revision of Laws Act 1968. Section 23(1) IA (in Part I IA) provides for the doctrine of ultra vires as follows:*

> *Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.*

G

The application of s. 23(1) IA has been explained by Mohd Zawawi Salleh FCJ in the Federal Court (FC) case of Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar [2020] 1 CLJ 1, at [81], as follows:

H

[81] *It is trite that subsidiary or delegated legislation shall not be broader than the enabling legislation. This general principle of statutory interpretation is codified in s. 23 [IA] ...*

and

(b) *RCA are made under s. 17 CJA. If r. 7(3A) of the RCA applies to Subsequent Evidence, this means r. 7(3A) of the RCA is inconsistent with the 2nd Part [s. 69(2) CJA] and by virtue of s. 23(1) IA, r. 7(3A) of the RCA is void to the extent of such an inconsistency.*

I

[26] *As explained in the above paragraph 25, by reason of the 2nd Part [s. 69(2) CJA] and 2nd Part [r. 7(2) of the RCA], the Plaintiffs do not require leave of the CA to use Dr. Selahuddeen's affidavit in these 3 appeals.*
(emphasis added)

[79] In view of Azimah Omar JCA's draft, I had reconsidered whether it was correctly decided in *Krishnasamy* that a party (appeal) is not required to apply for leave of the Court of Appeal to rely on subsequent evidence in the hearing of an appeal. After reconsideration, with respect, I still maintain the view that the Court of Appeal in *Krishnasamy* had not erred in deciding in the manner that it did. In my opinion, *Krishnasamy* could be further supported by the following reasons:

(i) the wording in s. 69(3) of the CJA (save as to matters subsequent as aforesaid) has clearly shown Parliament's intention for a party (appeal) to use subsequent evidence in an appeal in the Court of Appeal without obtaining prior leave of the Court of Appeal;

(ii) the words "save as to matters subsequent as aforesaid" in r. 7(3) of the RCA evince the intention of the rules committee to allow a party (Appeal) to rely on subsequent evidence in an appeal in the Court of Appeal without first obtaining leave from the Court of Appeal;

(iii) rule 7(3A)(a) of the RCA has expressly provided that the Court of Appeal can only grant leave for further evidence to be used if "at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available". It is clear that r. 7(3A)(a) of the RCA can only apply to existent evidence and not to subsequent evidence. This is because the subsequent evidence can only come into being after the decision of the High Court; and

(iv) if the Court of Appeal decides that prior leave of the Court of Appeal is required for the use of subsequent evidence in an appeal, this will render nugatory four express provisions of written law, namely:

  (a) the second limb (s. 69(2) of the CJA);

  (b) the words "save as to matters subsequent as aforesaid" in s. 69(3) of the CJA;

  (c) the second limb (r. 7(2) of the RCA); and

  (d) the words "save as to matters subsequent as aforesaid" in r. 7(3) of the RCA

(Four express provisions (subsequent evidence)).

[80] Premised on the reasons stated in *Krishnasamy* and the above para. 23, I am not able to see how a purposive interpretation of the four express provisions (subsequent evidence) can mandatorily require an application for leave of the Court of Appeal to admit subsequent evidence for the hearing of an appeal.

[81] Concerns had been raised in Azimah Omar JCA's draft regarding the application of *Krishnasamy* which allows subsequent evidence to be used in appeals without obtaining the Court of Appeal's prior leave. I will address such concerns as follows:

(i) with regard to the concern that certainty and finality in litigation may be undermined, firstly, the Court of Appeal can only allow an appeal in the following limited circumstances:

(a) if the trial court had made a plain error of fact as explained by the Federal Court's judgment delivered by Zabariah Yusof FCJ in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67, at [78];

(b) if the trial court's finding of mixed law and fact is erroneous – please refer to the judgment of Zawawi Salleh JCA (as he then was) in the Court of Appeal case of *P'ng Hun Sun v. Dato' Yip Yee Foo* [2013] CLJU 320; [2013] 1 LNS 320; [2013] 6 MLJ 523, at [14]; and/or

(c) the trial court made an error of law which:

(1) caused an injustice; and

(2) warranted intervention by the Court of Appeal.

The above legal position regarding the Court of Appeal's limited powers of appellate intervention, is well-settled and cannot be simply changed by allowing X to use subsequent evidence without prior leave of the Court of Appeal. In other words, I am not able to fathom how certainty and finality in litigation can be eroded by an application of *Krishnasamy*; and

(ii) there may be abuses wherein a party (appeal) (X) may tender existent evidence under the guise of subsequent evidence. In such a case, my response is as follows:

(a) whether further evidence constitutes existent evidence or subsequent evidence can be easily resolved. If X has filed a supplemental record of appeal (without prior leave of the Court of Appeal) which contains existent evidence (not subsequent evidence) (SRA), the opposing party (Y) has two options (two options), namely:

(1) Y may file an application in the Court of Appeal to expunge the SRA in the appeal in question; or

(2) at the time the appeal is heard in the Court of Appeal, Y may invite the Court of Appeal to disregard the SRA in the Court of Appeal's deliberation of the appeal;

(b) the burden to satisfy the Court of Appeal that the SRA contains subsequent evidence and not existent evidence, is solely on X (not Y). If X cannot discharge this burden, Y may exercise any one of the two options; and

(c) if X had abused the process of court by filing a SRA which contained extraneous evidence (without leave of the Court of Appeal), X may be penalised with costs, including costs on an indemnity basis, when Y exercises any one of the two options.

[82] An application of *Krishnasamy* with regard to subsequent evidence has the following benefit:

(i) the Court of Appeal will not be unduly burdened with applications for leave to adduce subsequent evidence for the purpose of the appeals (leave applications). In this sense, there is a saving of precious judicial time and resources;

(ii) hearings of appeals will not be unnecessarily delayed by the filing and disposal of leave applications; and

(iii) parties need not waste time, effort and costs with regard to the filing of leave applications, exchange of affidavits, preparation of written submissions and oral hearings of leave applications.

[83] With respect to the appellant's learned counsel, his reliance on *Krishnasamy* to support encl. 24 was misplaced as encl. 24 concerned existent evidence (the two documents were available before the High Court's decision) and not subsequent evidence. It is clear that *Krishnasamy* cannot apply to encl. 24 and this court cannot therefore overrule *Krishnasamy* in any event.

Third Scenario (With Regard To Existent Evidence)

[84] Firstly, for the third scenario, s. 69(3) of the CJA, rr. 7(3) and (3A) of the RCA require leave of the Court of Appeal before existent evidence can be resorted to in the hearing of an appeal.

[85] Secondly, I must confess I am not able to reconcile all the cases regarding the application and non-application of s. 69(3) of the CJA, rr. 7(3) and (3A) of the RCA. There are also cases which have merely applied *Ladd* without referring to s. 69(3) of the CJA, rr. 7(3) and/or (3A) of the RCA.

[86] I shall start with Denning LJ's (as he then was) judgment in *Ladd*, at 748, as follows:

> Counsel for the plaintiff has put the case on two grounds. First, he says the fresh evidence given by Mrs Marshall is so important that either it should be received by this court or that there should be a new trial so that the matter can be fully investigated. Secondly, he says that in all the circumstances the trial was unsatisfactory.
>
> It is very rare that application is made to this court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. *In order to justify the reception of fresh evidence* or a new trial, *three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible*.
>
> (emphasis added)

Ladd laid down the following three cumulative conditions to admit existent evidence for its use in an appeal (three cumulative conditions (*Ladd*)):

(i) the existent evidence could not have been obtained with reasonable diligence for use at the trial (first condition (*Ladd*));

(ii) the existent evidence "would probably have an important influence on the result of the case, although it need not be decisive" (second condition (*Ladd*)); and

(iii) the existent evidence "must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible" (third condition (*Ladd*)).

[87] Thirdly, my limited research discloses the following four approaches by Malaysian courts in deciding a leave application concerning existent evidence:

(i) before the establishment of the Court of Appeal and the enforcement of RCA, the following line of cases had applied the three cumulative conditions (Ladd) without any reference to s. 69(3) of the CJA (which provided for appeals from the High Court to the Federal Court at that time):

(a) Thomson LP's oral judgment in the Federal Court case of *Lam Soon Cannery Co v. Hooper & Co* [1965] CLJU 79; [1965] 1 LNS 79; [1965] 2 MLJ 148;

(b) the judgment of Suffian FJ (as he then was) in the Federal Court in *Lau Foo Sun v. Government Of Malaysia* [1970] CLJU 56; [1970] 1 LNS 56; [1970] 2 MLJ 70, at 71; and

(c) the decision of Chang Min Tat FJ in the Federal Court case of *Chai Yen*, at 143. A

(First approach).

With regard to the first approach, it is to be noted that when the Federal Court decided *Lam Soon Cannery*, *Lau Foo Sun* and *Chai Yen*, our apex court then was the Privy Council. Hence, the Federal Court's judgments in *Lam Soon Cannery*, *Lau Foo Sun* and *Chai Yen* were equivalent to the decisions of the present Court of Appeal; B

(ii) a second line of cases had applied both the three cumulative conditions (*Ladd*) and r. 7(3A) of the RCA (second approach). The second approach is demonstrated in the following two Court of Appeal cases: C

(a) in *Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd* [2005] 3 CLJ 238; [2005] 5 MLJ 1, at [4], Abdul Kadir Sulaiman JCA (as he then was) decided as follows: D

> [4] *The power of this court to grant leave to admit fresh evidence at the hearing of the appeal is governed by s. 69(3) [CJA] and r. 7(3A) [RCA]. The special grounds only referred to in [s. 69(3) of the CJA] and the tests set out in r. 7(3A) [RCA] are generally known as the Ladd v. Marshall conditions. It is settled by various decided cases that the three conditions are cumulative and conjunctive in effect and are not disjunctive in that all the conditions must be* fulfilled before such leave to admit fresh evidence be granted. The said *three conditions were also referred to by Thomson LP in Lam Soon Cannery Co v. Hooper & Co [1965] [1965] 2 MLJ 148 at p 148 as follows:* E F
>
> *...*
>
> *I pause to observe that these conditions are not alternative; they are cumulative.*
>
> (emphasis added)

(b) according to Suraya Othman JCA in *Dato' Ahmad Johari Tun Abdul Razak v. A Santamil Selvi Alau Malay & Ors And Other Appeals* [2020] 7 CLJ 588; [2020] 6 MLJ 133, at [16] and [18] to [23]: G

> [16] *Rule 7(3A) [RCA] are generally known as the three conditions or tests to be met before fresh/new evidence may be allowed to be adduced. These three conditions/tests are the three conditions/tests enunciated or stipulated in the case of Ladd v. Marshall [1954] 3 All Er. 7 45 which is the landmark case on the principles of adducing fresh/new evidence. Lord Denning at p. 748 held as follows:* H
>
> *...* I

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> [18] T*hus, it is trite that in order for the plaintiffs to succeed in their notices of motion, the plaintiffs must satisfy the following three pre-conditions as laid down in Ladd v. Marshall before these fresh/ new evidence can be admitted at the hearing of the appeals proper.*
>
> (emphasis added)

B

(iii) in *Mirza Mohamed Tariq Beg Mirza HH Beg v. Margaret Low Saw Lui & Ors* [2012] CLJU 387; [2012] 1 LNS 387; [2013] 2 MLJ 272, at 276 to 277, Low Hop Bing JCA delivered the following judgment of the Court of Appeal:

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> The law regulating the admissibility of further evidence in the Court of Appeal may be found in s. 69(1) and r. 7(1) and (3A).
>
> *Section 69(1) and r. 7(1) provide for the general rule that the Court of Appeal shall have all powers and duties, inter alia, to receive further evidence eg by affidavit*.

D

> *However, the above general rule must be read with r. 7 (3A) which states that, at the hearing of the appeal, further evidence shall not be admitted, unless the court is satisfied that:*
>
> *...*

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> *Section 69(1), r. 7(1) and (3A) have given statutory recognition to the principles enunciated in Ladd v. Marshall [1954] 1 All ER 745: see Datuk Seri Panglima bin Mohd Sari Datuk Hj Nuar v. Vee Seng Development Sdn Bhd & Ors [2009] 6 CLJ 102; [2009] 6 MLJ 643 (CA); and Hue Ngee On v. Chai Woo Siew (as public officer of the Hakka Association Kulai, Johor) [2009] 5 CLJ 734; [2009] 5 MLJ 176 (CA).*

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> We note that the reports reveal the accounts of Pakar SB and its creditors and debtors, and state that Pakar SB could not pay creditors due to disagreement on which party and the amount to be paid.
>
> The issues raised in the reports do not relate to the appeal proper nor do they indicate any support thereof. Further, the reports were not comprehensive and do not contain the respondent No. 8's response and explanations. *While the reports may be new evidence and therefore fulfils condition r. 7(3A)(a), they cannot be said to have a determining influence upon the decision of the High Court or the outcome of the appeal proper which relates to allegedly oppressive acts in the petition*. The report did not raise anything to support the appellant's allegations in the petition.

G

H

> *Although the appellant has averred that the reports would have a "determinative influence' over the decision of the High Court, these averments remain bare assertions without condescending on particulars as to how the reports and the new evidence would have had over the alleged "determinative influence'. We are of the view that the appellant has not fulfilled r. 7 (3A)(b).*
>
> (emphasis added)

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Mirza Mohamed referred to s. 69 of the CJA and *Ladd*. However, *Mirza Mohamed* only applied r. 7(3A) of the RCA in that case (third approach); and

(iv) the last approach was laid down by Abdul Malik Ishak JCA in the following two Court of Appeal cases (fourth approach): A

(a) according to *Teoh Kien Peng*, at [40], [42], [44], [54] and [71] to [74]:

[40] *Should we slavishly follow Ladd v. Marshall or should we be freed from its strait-jacket three conditions? Sad to say, it is the courts that let the three conditions in Ladd v. Marshall to be compartmentalized as a strait-jacket. For my part, I will not let Ladd v. Marshall to stand in the way of doing justice to an individual case. Old vintage cases like Scott v. Scott [1863] 3 Sw. & Tr. 320, 325, The English Reports volume 164, page 1298, at 1300; and Brown v. Dean And Another [1910] A.C. 373 should be referred to and these two cases have been overshadowed and ignored and put into oblivion since the arrival of Ladd v. Marshall in 1954 …* B C

...

[42] *Cases may arise in future where it would be proper to admit fresh evidence on an appeal by way of a re-hearing on the simple ground that it appears just to do so and nothing else (Sinanide v. La Maison Cosmeo* [1927-1928] vol: XLIV, The Times Law Reports 574) … D

...

[44] *There were cases in the past where the courts had admitted fresh evidence without even referring to the principles in Ladd v. Marshall …* E

...

[54] *Of course, you cannot allow Ladd v. Marshall to stand in the way of doing justice in an individual case. I have said this earlier. When you see this happening, you will notice that the decided cases have been distinguished by the judges and when this happens you will see that the law has become more elaborate. This causes no difficulty because it illustrates the exercise of discretion by the judges to the particular facts of the case.* F

...

[71] *For my part, I have this to say. That I should not "affront common sense" by shutting my eyes and not allow the reception of those photographs as fresh evidence.* G

[72] *Ladd v. Marshall is a "thorn in the flesh" for many applicants who are interested in adducing new or fresh evidence. Just like the English Civil Procedure Rules 1998 ("CPR"), our [r. 7 (3A) of the RCA] should relax the rigours of Ladd v. Marshall.* H

[73] At the end of the day, the criticism that can be advanced in this appeal would be this. That the sessions court judge was given an incomplete disclosure in regard to the recovery of the respondent/plaintiff. *This Court certainly has the jurisdiction to avoid real injustice in exceptional and appropriate cases.* This is one of those cases. I

A

[74] *The court is usually reluctant to deprive a litigant of a judgment obtained after a full trial. That is quite understandable. But there are circumstances in which justice may require the court to receive the fresh evidence and upset the judgment. According to Lord Atkin in Ras Behari Lai And Others v. King Emperor* [1933-1934] vol. L, The Times Law Reports 1 at page 2:

B

Finality is a good thing, but justice is better.

(emphasis added)

(b) it was decided by Abdul Malik Ishak JCA in *Datuk Seri Panglima Mohd Sari*, at [25] and [36] to [38], as follows:

C

[25] *Perhaps the time has come for the court to admit fresh evidence on an appeal by way of a re-hearing simply on the ground that it appears just to do so* (*Sinanide v. La Maison Cosmeo* [1927-1928] 44 TLR 574).

...

D

[36] *All the three conditions in Ladd v. Marshall have been satisfied. I would accordingly, without hesitation, allow encl. 31a.*

[37] *Once again, permit me to refer to my unreported dissenting judgment in the Court of Appeal vide Civil Appeal No: P-04-50-*2006, *Teoh Kien Peng & Anor v. Thannimalai Subramaniam*. There, this was what I said:

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...

[38] *Now, even if I were to apply the provisions of r. 7(3A) [RCA], I would still allow encl. 31a in favour of the appellant defendant. And additionally, it is also just to do so.*

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(emphasis added)

The First Approach

[88] I am not in favour of the first approach. This is because the first approach did not consider, let alone apply, s. 69(3) of the CJA. CJA is not G only enacted by our Parliament but by virtue of s. 4 of the CJA, CJA overrides all other written law (save for the Federal Constitution). Section 4 of the CJA states as follows:

s. 4 *Provision to prevent conflict of laws*

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In the event of inconsistency or conflict between [CJA] and any other written law other than the Constitution in force at the commencement of [CJA], the provisions of [CJA] shall prevail.

(emphasis added)

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The Second Approach

[89] I am of the following view with regard to the second approach:

(i) both s. 69(3) of the CJA and r. 7(3) of the RCA allow the Court of Appeal to admit extraneous evidence for the hearing of an appeal on "special grounds" only. However, neither the CJA nor RCA has provided any definition of "special grounds";

(ii) the term "special grounds" in s. 69(3) of the CJA and r. 7(3) of the RCA should allow the application of the three cumulative conditions (*Ladd*). In this regard, I rely on the following judgment of Hale LJ (as she then was) in UK's Court of Appeal in *Hertfordshire Investments Ltd v. Bubb And Another* [2000] 1 WLR 2318, at 2324:

> *Special grounds, as we all know, meant that the fresh evidence satisfied the principles in Ladd v. Marshall [1954] 1 WLR 1489: that is, that it could not have been obtained with reasonable diligence for use at trial; if given it would probably have had an important influence on the result of the case; and it is apparently credible although not incontrovertible; although there are exceptional cases in which those principles do not apply, for example those involving the welfare of children.*
>
> *There are, of course, strong reasons for this approach, which has a long pedigree. It is in the interests of every litigant and the system as a whole that there should be an end to litigation. People should put their full case before the court at trial and should not be allowed to have a second bite at the cherry without a very good reason indeed.*
>
> (emphasis added)

(iii) according to the cases which had applied the second approach, r. 7(3A) of the RCA is considered to have embodied the three cumulative conditions (*Ladd*). I agree that r. 7(3A)(a) RC has provided for the first condition (*Ladd*). Having said that:

(a) r. 7(3A)(b) of the RC has provided for an extremely high threshold, namely the existent evidence "would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be" (determining influence condition (trial court's decision)). The determining influence condition (trial court's decision) is a higher threshold than the second condition (*Ladd*) (the existent evidence "would probably have an important influence on the result of the case, although it need not be decisive); and

(b) the third condition (*Ladd*) (the existent evidence "must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible)" is not provided in r. 7(3A)(a) and (b) of the RCA.

A The above two differences between r. 7(3A)(b) of the RCA on the one hand and the second and third conditions (*Ladd*) on the other hand, clearly shows that r. 7(3A) of the RCA cannot embody the second and third conditions (*Ladd*);

B (iv) the determining influence condition (trial court's decision) may cause an injustice in the following manner:

(a) a party (Appeal) (Z) may be able to fulfil the three cumulative conditions (*Ladd*) in respect of a piece of existent evidence (existent evidence Q) but cannot satisfy the determining influence condition (trial court's decision) with regard to existent evidence Q. Hence, solely by virtue of r. 7(3A)(b) of the RCA, Z cannot use existent evidence Q for the purpose of Z's appeal; and

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(b) existent evidence Q can persuade the Court of Appeal that the High Court is "plainly erroneous" in the High Court's finding of fact. In this sense, Z would have suffered an injustice due to an application of r. 7(3A)(b) of the RCA; and

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(v) in view of the conflicting cases (please refer to the above para. [87] and the possible injustice caused by r. 7(3A)(b) of the RCA (as explained in the above sub-para. (iv)), time is ripe for law reform as follows:

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(a) our legislature should incorporate the three cumulative conditions (*Ladd*) in s. 69(3) of the CJA with regard to existent evidence; and

(b) the entire r. 7 of the RCA, in particular r. 7(3A)(b) of the RCA, should be repealed by the Rules committee.

F *The Third Approach*

[90] As explained in the above sub-paras. [89](ii) to (iv), I have reservations regarding the third approach.

The Fourth Approach

G **[91]** I am not inclined to accept the fourth approach because:

(i) the fourth approach does not apply s. 69(3) of the CJA – please refer to the above para. [88];

(ii) this will undermine certainty and finality in litigation.

H **[92]** It is to be noted that Abdul Malik Ishak JCA delivered a dissenting judgment in *Teoh Kien Peng*. In *Teoh Kien Peng*, the two majority judges of that panel, namely, James Foong Cheng Yuen JCA (as he then was) and Vincent Ng Kim Khoay JCA, did not deliver a majority judgment. From the viewpoint of the *stare decisis* doctrine, a dissenting judgment of a judge in an appellate court cannot constitute a binding precedent unless the dissenting judgment has been affirmed or applied by the Federal Court.

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[93] In *Datuk Seri Panglima Mohd Sari*, Abdul Malik Ishak JCA had applied the three cumulative conditions (*Ladd*). Hence, Abdul Malik Ishak JCA's *dicta* (regarding the Court of Appeal's wide discretion to admit existent evidence for the hearing of an appeal merely in the interest of justice) is purely obiter.

Grounds For The Decision (Enclosure 24)

[94] I have no hesitation to dismiss encl. 24 with costs of RM5,000 (subject to allocatur fee). My reasons are as follows:

(i) the appellant had possession of the two documents before the High Court's decision and could have adduced these two documents with reasonable diligence for the appellant's use in the OS before the learned High Court Judge. In other words, the first condition (*Ladd*) had not been fulfilled by the liquidators in encl. 24; and/or

(ii) the two documents could not have any influence on the High Court's decision because:

(a) s. 8A of the STA had been introduced by the Strata Titles (Amendment) Act 2013 (Act A1450) which came into effect in Negeri Sembilan on 1 June 2015. Reproduced below is the relevant part of s. 8A of the STA:

s. 8A *Application for certificate of proposed strata plan.*

(1) *For the purpose of subsection 9(1), the original proprietor of any alienated land on which the building or land is capable of being issued with strata titles shall apply for a certificate of proposed strata plan to the Director of Survey [respondent] by submitting Form 10 together with the following:*

(a) fees for the survey carried out or caused to be carried out under subsection 8A(8);

(b) except in a case falling under paragraph (c), the original copy of the building plans approved by the local planning authority;

(c) if the original copy of the building plans approved by the local planning authority are not available, the application under this subsection shall be accompanied by:

(i) plans of the building, certified by a Professional Architect or by a land surveyor as having been drawn according to the actual features of the building and as truly representing those features; and

(ii) a certification by a duly authorized officer of the appropriate local planning authority that the building as represented by the plans mentioned in subparagraph (i), was erected with planning

permission but the plans and specifications by reference to which that permission was given are no longer available, and that the local planning authority is nevertheless satisfied that the building as so represented satisfies planning requirements;

(d) a proposed strata plan comprising a location plan, storey plan and delineation plan, containing such details as are specified in subsections (2), (3), (4), (5), (6) and (7) respectively, and certified by a land surveyor as follows:

(i) that he has made a comparison of the plans to the approved building plans prepared by a Professional Architect registered under the Architects Act 1967 [Act 117] or a Professional Engineer registered under the Registration of Engineers Act 1967 [Act 138] responsible for its construction, or in a case falling under paragraph (c), to the building plans which have been drawn and certified by the Professional Architect or by the land surveyor;

(ii) in the case of a storey plan, that the boundaries of the parcels shown thereon follow features of permanent construction appearing in the building;

(iii) that the building or buildings are situated wholly within the boundaries of the lot in question, but discounting any eave, awning, and any balcony not forming part of a proposed parcel, which projects over a road reserve to which there subsists a permit or permits issued under section 75A of the National Land Code in respect of every such eave, awning and balcony;

(iv) that each of the proposed parcels has:

(A) an adequate means of access not passing through another parcel; and

(B) an adequate means of internal communication not passing through the common property;

(e) that it has been certified by a land surveyor that the position of each provisional block as delineated on the location plan is wholly within the boundaries of the lot in question;in the case of any building or land parcels for the erection of which planning permission was required, a certification by the Professional Architect or by the Professional Engineer referred to in subparagraph (1)(d)(i) that the building was constructed in accordance with the plans and specifications by reference to which that permission was given; and the plans and

specifications of the buildings state the date on which such permission was given and the reference number, if any;

(f) a certified copy of the final title of the lot;

(g) a certified copy of the document that certifies the super structure stage for the case under paragraph 8(2)(a);

(h) a certified copy of the certificate of completion and compliance or certificate of fitness for occupancy, as the case may be, except in the case under paragraph 8(2)(a); and

(i) a certified copy of the schedule of parcel or amended schedule of parcels, as the case may be, filed with the Commissioner under the Strata Management Act 2013 except in the case under paragraphs 8(2)(b) and (d).

(1A) *Notwithstanding subsection (1), the Director of Survey [respondent], in approving the application for the certificate of proposed strata plan*:

(a) of a special building; or

(b) in any other circumstances where he deems fit,

may give exemption to the documents in paragraphs (1)(e) and (h) or require any other documents together with the application.

...

(8) *The Director of Survey shall thereupon check the location plan, storey plan and delineation plan, whichever is applicable, carry out or cause to be carried out such survey of the land, any of the buildings thereon or any of the parcels, and shall:*

(a) *issue a certificate of proposed strata plan to the applicant if he is satisfied that the plans are in order;*

(b) issue a copy of such certificate to the Land Administrator for the purpose of section 8; and

(c) notify the Land Administrator of the amount of fees to be collected in respect of the plans caused to be prepared in the event of the approval of the application.

...

(emphasis added)

The Strata Title (SVV project) was registered on 29 June 2007 (before the enforcement of s. 8A of the STA on 1 June 2015). Hence, the two documents were not relevant for this appeal; and

A (b) the two documents (regarding SVV project, a housing development project which was different from CNV project) were not the documents which were required by s. 8A(1)(a) to (i) of the STA to be submitted by the appellant (in respect of CNV project) to the respondent. In other words, the respondent was not under a
B statutory duty to consider the two documents.

Premised on the above two reasons, the second condition (*Ladd*) had not been satisfied by the appellant in encl. 24.

A Plea For Law Reform

C **[95]** I end this judgment with a plea for law reform as proposed in the above sub-para. [89](v).

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